BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244 Case No. SC01-2670
(Judge Charles W. Cope)
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THE SPECIAL COUNSEL'S MEMORANDUM OF AUTHORITIES

IN OPPOSITION TO RESPONDENT'S EMERGENCY MOTION TO COMPEL

The issue before the panel is whether the Special Counsel must disclose a report prepared by an investigator retained by the Investigative Panel in the course of the investigative proceedings leading up to the filing of formal charges in this case. This issue is of profound importance to the functioning of the Commission's Investigative Panel. An adverse ruling will hinder the Investigative Panel's ability to adequately investigate charges before filing a notice of formal proceedings, which may prejudice the rights of future judges targeted by allegations of judicial misconduct. Additionally, an adverse ruling will have a chilling effect on witnesses' willingness to provide the Commission's investigator with information relevant to charges of judicial misconduct. Because this is an extremely important question having a substantial impact on how the Investigative Panel performs its constitutional duties, the Special Counsel provides this memorandum of law.

Background

[1]

It is common practice for the Investigative Panel to retain a private investigator to conduct interviews with witnesses related to charges of judicial misconduct or disability. The

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[1] The Special Counsel proffers these facts. Due to the emergency nature of the Special Counsel's motion, he has not had sufficient time to obtain affidavits in support of these facts. If the panel requires evidence to support these statements, the Special Counsel requests adequate time to procure affidavits.

investigator informs the witness that the investigation is confidential pursuant to the Constitution of the State of Florida. After the interview, the investigator prepares a report exclusively for use by the Investigative Panel and/or the Special Counsel. The report is not a verbatim recounting of the witness' statements. Instead, the report summarizes the interview based on the investigator's recollections and includes the investigator's personal observations and mental impressions. The report is not read or shown to the witness, and the witness is not given the opportunity to review, approve, adopt, or reject the report.

The investigator is directed at all times by either the General Counsel of the Commission or the Special Counsel appointed for a particular case. By using an investigator, the Commission saves the public expense of having the attorneys conduct all interviews personally. After a notice of formal proceedings is filed, the investigator often continues to work with the Special Counsel to assist in the further preparation for the hearing on the merits.

These general procedures were followed in this case. At the request of the General Counsel of the Commission,

[2] the investigator interviewed Nina V. Jeanes, M.D., who is one of the two victims of the judicial misconduct with which Respondent is charged. The investigator prepared a three paragraph report of his interview, which contained his mental impressions along with a summary of what Dr. Jeanes told him. He did not show the report to Dr. Jeanes, and Dr. Jeanes has never seen the report, much less adopted, approved, or agreed to the contents of the report. The investigator provided the report to the General Counsel for the Commission, who forwarded it to the Investigative Panel to consider in determining whether there was probable cause to file formal

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2 The Special Counsel had not yet been appointed.

charges.

The Respondent made a request pursuant to JQC Rule 12(b) for "[t]he names and addresses of all witnesses whose testimony the special counsel expects to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the counsel or the investigative panel which are relevant to the subject matter of the hearing." [3] The Special Counsel has identified Dr. Jeanes as a witness he expects to offer at the hearing, but has withheld the investigator's report of the interview with Dr. Jeanes.

The Report Is Protected by Article V, Section 12(a)(4) and JQC Rule 23(a)

The Constitution of the State of Florida mandates that proceedings before the Investigative Panel must be confidential:

> Until formal charges against a justice or judge are filed by the investigative panel with the clerk of the supreme court of Florida all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the investigative panel with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public.

Fla. Const. art. V, 12(a)(4). This constitutional mandate is implemented by JQC Rule 23(a). The plain language of this constitutional provision is clear; all proceedings up through the filing of formal charges are confidential, and "all <u>further</u> proceedings" thereafter are public.

The use of the word "further"

[4] demonstrates that the confidentiality attaching to the Investigative Panel's proceedings does not

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[3] The Special Counsel did not object to this request as overly broad. The Special Counsel did make such an objection to the second request by Respondent, which sought "A list of all documents in the possession of the special counsel not provided with this demand." The Respondent has not moved to compel on this request.

[4] Further is defined as "going or extending beyond." <u>Webster's Ninth New Collegiate Dictionary</u> 500 (1989).

terminate upon the filing of formal charges. Thus, for example, the Supreme Court of Florida has held that the complaint and the identity of the complainant are absolutely confidential, even after formal charges have been filed. In re Graziano, 696 So. 2d 744, 751 (Fla. 1997). The Court explained that the constitutional mandate of confidentiality protected not only the judge under investigation (whose legitimate interest in confidentiality dissipates upon the finding of probable cause), but also the complainant: "[C]onfidentiality allows the JQC to process efficiently complaints from any and all sources while protecting the complainant from recriminations and the judicial officer from unsubstantiated charges." Id. (citing Forbes v. Earle, 298 So. 2d 1, 4 (Fla. 1974)).

This policy does not and, for practical reasons, cannot be limited to statements from the initiating complainant; it must extend to statements to the Investigative Panel by all witnesses. The Supreme Court of Florida has explained,

> Confidentiality is also necessary for the Commission to carry out its responsibility to make suitable recommendations concerning judicial personnel problems that affect court efficiency. Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system.

Forbes v. Earle, 298 So. 2d 1, 4 (Fla. 1974); see also Illinois Judicial Inquiry Bd. v. Hartel, 380 N.E.2d 801, 803 (Ill. 1978) (noting that in addition to protecting judges from unfounded charges, "[o]ther elements, including encouragement and protection of witnesses, must also be evaluated") (plurality opinion); In re Mikesell, 243 N.W.2d 86, 94 (Mich. 1974) ("While the policy of confidentiality protects the judge and might arguably be waived by him, the confidentiality provisions also protect witnesses and citizen complainants.").

In a related context, the Second District recently upheld the right of witnesses to keep their reports of judicial misconduct confidential as against a public records request in Media General

Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit, 794 So. 2d 631 (Fla. 2d DCA 2001). The court noted that administrative policies of keeping sexual harassment complaints confidential "serve the important purpose of encouraging victims of sexual harassment and those who witness it to come forward." Id. at 635 (emphasis added). The court went on to hold that even if the complainant waives the confidentiality requirement, statements by victims and witnesses remain confidential. It reasoned,

> A holding to the contrary would betray victims and witnesses who previously have been induced to come forward by promises of confidentiality, and it would undermine the policy against discrimination in the workplace by rendering such promises unreliable in the eyes of the people they are intended to protect.

Id. at 634-35. Substitute "judicial misconduct" for "discrimination" and this reasoning applies directly to the issue at hand.

Another useful analogy is to reports made to investigating police officers, which are privileged under section 316.066(4) of the Florida Statutes. The Fourth District has observed that the "purpose of this privilege is encouraging people to report truthfully to police to aid their investigation without fear of penalty." Selected Risks Ins. Co. v. White, 447 So. 2d 455, 456 (Fla. 4th DCA 1984). The same policy and purpose underlies the constitutional protection of investigative proceedings, perhaps with even more importance. For the sake of the public's confidence in the judiciary, people must be encouraged to provide relevant information to the Investigative Panel's investigator without fear of recrimination.

If everything a witness tells an investigator during the investigative proceedings is subject to disclosure, there will be a chilling effect that will make witnesses less likely to come forward or cooperate for fear of recriminations.

[5] The judge's due process rights are not implicated, moreover, because the judge can always depose any witness whose testimony the Special Counsel intends to offer at the hearing.

[6]

The rule of law that Respondent asks this Panel to adopt would not appear to be limited to statements taken by the investigator. If the witness provided the statement directly to the Investigative Panel (e.g., by appearing personally before the panel), Respondent would have this Panel abrogate the confidentiality of those direct proceedings. Surely, the Investigative Panel should be allowed to hire an investigator to interview witnesses without requiring witnesses to appear live.

Additionally, it makes little sense to distinguish a witness's statement from a complainant's statement. Graziano makes clear that the complaint may not be disclosed to the judge. This holding would be undermined, however, if the statements of all witnesses had to be produced. This case presents the perfect example. The Special Counsel is prohibited from revealing to Respondent the identity of the complainant(s). The complainant, of course, will frequently be a witness that the Special Counsel expects to offer at the hearing. If the Special Counsel must provide statements of all witnesses except the complainant, then the Respondent can easily determine the identity of the complainant by process of elimination.

Respondent argues that the investigator's report must be produced because it was considered by the Investigative Panel. The Respondent may rely on certain dicta from the Supreme Court's

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5 Though not in this instance, witnesses interviewed by the investigator are frequently attorneys who appear before the subject judge. The fear of recrimination under those circumstances is even more real.

6 The issue of whether the rule in Brady v. Maryland, 373 U.S. 83 (1963), applies in JQC proceedings is not now before the Hearing Panel. See, e.g., Hartel, 380 N.E.2d at 806-07 (holding that Illinois' constitutional confidentiality provision protects witness statements unless they are exculpatory under Brady) (plurality opinion). The report in this case in no way negates the Respondent's culpability. If there is any concern that the investigator's report might constitute Brady material, the Hearing Panel can review the report in camera.

decision in Graziano. Specifically, the Court stated:

> Although not allowing for discovery of the complaint itself, discovery pursuant to rule 12(b) allows an accused judge to have full access to the evidence upon which formal charges are based. The policy reasons for the confidentiality of the original complaint clearly outweigh any benefit the discovery of it could have in view of the discovery right provided by rule 12.

Graziano, 696 So. 2d at 751-52. The issue of whether otherwise confidential information must be produced if it was "evidence upon which formal charges are based" was neither before the Supreme Court nor discussed by the Supreme Court in Graziano. Thus, this statement cannot and should not be read to abrogate the constitutional requirements of confidentiality.

The Court's reasoning in Graziano is easily reconciled with the Special Counsel's position. Not all statements or transcripts that were considered by the Investigative Panel are automatically confidential; statements are confidential under the Florida Constitution only if they were made directly to the panel or its investigator during the course of the investigative proceedings. Thus, the Special Counsel has provided Respondent with all statements of the witnesses he expects to offer that were not obtained either in the course of the investigative proceedings or as part of the Special Counsel's preparations for the hearing in this case. For example, the Special Counsel has provided the Respondent with transcripts of the Carmel Police Department's interrogation of the Respondent following his arrest, as well as transcripts of the victims' 911 call and a transcript of an interview with one of the victims by an investigator for the California district attorney's office. Moreover, Respondent has full opportunity to depose Dr. Jeanes, so denying him the investigator's report will not prejudice his due process rights.

Nothing in Rule 12(b) can be used to circumvent the confidentiality of the investigative proceedings. In addition to the clear supremacy of a constitutional provision over a rule of court,

the rule requires production of witness statements/transcripts "except those documents confidential under the Constitution of the State." JQC Rule 12(b). Because the investigator's report is confidential under Article V, Section 12, Respondent's motion to compel should be denied.

The Report Is Protected as Trial Preparation Material

The trial preparations protection in Rule 1.280(b)(3), Florida Rules of Civil Procedure, provides an alternative reason to deny Respondent's motion to compel. The Florida Rules of Civil Procedure are applicable to these proceedings "except where inappropriate or as otherwise provided by these rules." JQC Rule 12(a). Nothing in the JQC's rules or the policies underlying the rules renders Rule 1.280(b)(3) inapplicable.

This rule provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery is in need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fla. R. Civ. P. 1.280(b)(3). Reports of witness statements taken by a party's investigator to prepare for trial are classic examples of protected trial preparation materials. E.g., Lifshutz v. Citizens & Southern Nat'l Bank of Fla., 626 So. 2d 252, 252 (Fla. 4th DCA 1993); Alachua General Hosp., Inc. v. Zimmer USA, Inc., 403 So. 2d 1087, 1088 (Fla. 1st DCA 1981).

The policy underlying the work product doctrine is that "one person is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures." DeBartolo-Aventura, Inc. v.Hernandez, 638 So. 2d 988, 990 (Fla. 3d DCA 1994). The Supreme

Court of Florida has long recognized that a "party may not be required to set out the contents of statements [obtained in preparation for trial] absent rare and exceptional circumstances." Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 113 (Fla. 1970).

There are no "rare and exceptional circumstances" here. Respondent has made no argument that he cannot obtain Dr. Jeanes' version of events by other means without substantial hardship. Indeed, he cannot makes such a showing as he is set to depose Dr. Jeanes.

Moreover, if the panel were to rule that the trial preparations protections of Rule 1.280(b)(3) do not apply to material falling under the scope of Rule 12(b), the ability of the Special Counsel in this case – and special counsels in all other cases – to effectively prepare for hearing will be substantially undermined. Rule 12(b) is not expressly limited to statements obtained prior to the filing of formal charges. To effectively prepare for trial, special counsels (either directly or through an agent such as an investigator or paralegal) have to interview their witnesses. If the notes or reports of those interviews are not protected by the trial preparations doctrine, the special counsels will not be able to effectively do their job. The Respondent's motion should be denied to protect the integrity of the proceedings before the Commission.

The Reports Are Not Witness Statements

Finally, there is a narrower ground on which the panel may deny the Respondent's motion without resolving the two substantial and far-ranging questions briefed above. The investigator's report simply does not fall within Rule 12(b)'s description of "written statements and transcripts of testimony of" witnesses the Special Counsel expects to call. Dr. Jeanes has never seen the report, much less adopted it as her statement. A report by an investigator of his conversations with a witness – which report has not been read by, adopted by, approved by, or signed by the witness – cannot be considered a statement of the witness.

A "statement" is defined for discovery purposes as "a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." Fla. R. Civ. P. 1.280(b)(3) (emphasis added). The investigator's report clearly does not satisfy this definition.

The Supreme Court's Order in Holloway Is Not Controlling

The only legal authority on which the Respondent lies in an unpublished order of the Florida Supreme Court in In re Holloway, Case No. SC00-2226. A true and correct copy of the order upon which Respondent appears to rely is attached hereto as **Exhibit A**. The order – in its entirety with regard to the motion to compel filed in that case – states:

> Petitioner's Motion to Compel is hereby granted only as to statements used in determining probable cause. The Motion of the Judicial Qualifications Commission in Opposition to Judge Cynthia A. Holloway's Motion to Compel is hereby denied.

Thus, the Court granted a motion to compel production of reports by the Investigative Panel's investigator, but only as to reports considered by the Investigative Panel.

[7] The Supreme Court's order compelling production of the investigator's report is not controlling in this case for several reasons.

As an initial matter, the order, which was not an opinion of the Court, was not published and therefore has no precedential effect. The order does not explain the facts, the issues, or the Court's reasoning, much less establish any principle of law Moreover, not all of the arguments discussed

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[7] For this reason, there appears to be no dispute in this case that reports of the investigator prepared after the filing of formal charges need not be produced.

above were raised before the Supreme Court. The Court ordered the special counsel in that case to file a brief with only 24 hours advance notice. A true and correct copy of this order is attached as **Exhibit B**. Given the time constraints, her brief only addressed the issues of work product and whether the reports in that case constituted "statements." A true and correct copy of this brief is attached hereto as **Exhibit C**. No mention was made of the constitutional arguments set forth above. Thus, the Supreme Court has given no indication of its view on these arguments.

Additionally, the Holloway order is distinguishable on its facts. In that case, the Court ordered production only of documents "used in determining probable cause." There is no evidence in this case that the Investigative Panel relied on the report one way or another in determining probable cause.

Finally, the Supreme Court lacked jurisdiction to issue the order in the Holloway case. Pursuant to JQC Rule 21, "the Florida Rules of Appellate Procedure and Rule 2.140 of The Florida Rules of Judicial Administration shall be applicable to reviews of Investigative and Hearing Panel proceedings by the Supreme Court." Neither Rule 2.140 nor any of the appellate rules provide for direct appellate review of nonfinal discovery orders. Certiorari relief was not requested in that case, and the Supreme Court did not indicate that it was conducting certiorari proceedings. In any event, a writ of certiorari would not have been appropriate in that case because any error could have been cured on plenary appeal of the ultimate final recommendation of the Commission. See, e.g., Post-Newseek Stations, Fla., Inc. v. Kaye, 585 So. 2d 430, 431 (Fla. 3d DCA 1991) (holding that certiorari is not available to review denial of discovery request because any error can be cured on appeal). In short, the Supreme Court's ruling in Holloway does not require that Respondent's motion to compel be granted.

Conclusion

For the foregoing reasons, Respondent's Motion to Compel should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson,** Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly,** Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, this 18th day of January, 2002.

By:
John S. Mills, Esq.
Florida Bar No. 0107719
Special Counsel
Florida Judicial Qualifications Commission
Foley & Lardner
200 Laura Street
Jacksonville, Florida 32201-0240
(904) 359-2000 Telephone